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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VALMAS BROTHERS SHIPPING, S.A.
AND
VALSKY MARITIME, LTD.,
Petitioners

v.

JACK FISHER, ETC.
AND
EUGENIA KEPESSIDIS, Individually, Etc.,
Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1.

Whether, as the decision of the panel below held, a single call to pick up cargo in an American port—by a foreign vessel owned and operated by Greek citizens, flying the Greek flag, carrying a Greek crew, and directed solely out of Greece—establishes a substantial base of operations in the United States as required by the Court's decision in *Hellenic Lines, Limited v. Rhoditis,* 398 U.S. 306, reh. den. 400 U.S. 856 (1970), before American law is applicable to injuries and deaths of foreign seamen in American ports.*

2.

Whether, as the panel below held, American law is to be applied to injury/death claims by foreign seamen employed by foreign shipowners aboard foreign flag vessels under a contract providing for the application of foreign law by a foreign seaman on the vessel's only call in an American port to pick up cargo solely because the injury/death occurred in an American port.**

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* Former Chief Judge John R. Brown, for himself and *seven* of his fellow Circuit Judges, in dissenting from the refusal by the Court below to rehear this case *en banc,* said in part:

> ". . . The panel's reliance on *Rhoditis* is misplaced, first, because I believe that some of the findings of the panel with respect to defendants' purported 'base of operations' in the United States simply have no support in the record, and second, and much more significant for purposes of en banc consideration, because I am convinced that the panel's opinion misinterprets the holding of *Rhoditis* and applies a legal standard contrary to the law of this Circuit." 636 F.2d 1107, at 1108; App. p. 30.

** In *Lauritzen v. Larsen,* 345 U.S. 571 (1953), the Court held even doing "more or less frequent and regular business" within the United States is not enough "to bring a foreign transaction between

II

3.

Whether by judicial decree the public policy of the United States for compensating injury/death claimants is to be substituted for the public policy of both the seamen's and the shipowner's own foreign country simply because the injury/death fortuitously occurs within the United States.

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foreigners in foreign ports under American law." 345 U.S. at 590. And in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the Court reiterated this rule when the cause of action arose in an American port:

> ". . . To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous, but also an unduly speculative burden, disruptive of international commerce and without basis in expressed policies of this country. The amount and type of recovery (for injury/death) which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury." (Parenthetical expression added). 358 U.S. 354, at 384 (1959).

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties to the proceedings below and, additionally, all parties and persons believed to be interested in the outcome of this Petition;

1. Eugenia Kepessidis, wife of decedent Dimitrios Kepessidis, individually and as personal representative of the Estate of Dimitrios Kepessidis;
2. Kosmas Kepessidis, minor son of Eugenia Kepessidis;
3. Kosmas Kepessidis, father of decedent Dimitrios Kepessidis;
4. Mrs. Olga Kepessidis, mother of decedent Dimitrios Kepessidis;
5. Jack Fisher, as personal representative of the Estate of Dimitrios Kepessidis, deceased;
6. Counsel for all of the above named parties;
7. Valmas Brothers Shipping, S.A., operator of the M/V AGIOS NICOLAOS V;
8. Valsky Maritime, Ltd., owner of the AGIOS NICOLAOS V;
9. The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg), underwriter at interest for the AGIOS NICOLAOS V and its owners.

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UNITED STATES STATUTES

46 U.S.C. § 688 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on October 10, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 628 F.2d 308 and is printed in the separate Appendix filed with this Petition, *infra* p. 1.* The Order of the United States Court of Appeals

* The Appendix also contains all of the evidence dealing with base of operations.

for the Fifth Circuit denying the Petition for Rehearing En Banc and the opinion of seven Circuit Judges dissenting from the refusal to rehear the case en banc are reported at 636 F.2d 1107, and are printed in the Appendix at page 27. Findings of Fact and Conclusions of Law of the United States District Court for the Eastern District of Texas are printed in the Appendix at page 53. The Judgment of the United States District Court for the Eastern District of Texas is set forth in the Appendix at page 72. The order of the United States District Court for the Eastern District of Texas of November 28, 1977, retaining jurisdiction and denying Defendant's Motion to Decline Jurisdiction is in the Appendix at page 48.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 10, 1980. A timely Petition for Rehearing En Banc was filed and Rehearing En Banc was denied, seven judges dissenting, on January 28, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Respondents' alleged application of the Jones Act, 46 U.S.C. § 688, which provides as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the

death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

STATEMENT OF THE CASE

This is an action for damages for the death of a Greek seaman, Dimitrios Kepessidis, who was killed in a boiler explosion aboard the Greek vessel AGIOS NICOLAOS V on June 1, 1976, in Beaumont, Texas, against his Greek employers.

Dimitrios Kepessidis was a life-long resident and citizen of Greece. He had been employed by Valmas Brothers Shipping, S.A. as a Chief Engineer. He agreed to work for Valmas by signing an employment contract in Piraeus, Greece, which incorporated the terms of the Collective Agreement between his labor union and Greek shipowners, and was thereafter flown to Beaumont, Texas, where he joined the vessel on May 22, 1976. He was killed in a boiler explosion aboard the vessel in Beaumont, Texas, on June 1, 1976.

The AGIOS NICOLAOS V had recently been purchased by Valsky Maritime, Ltd., the owning company, from a Swedish company. Prior to its call in Beaumont, the ship underwent repairs and general maintenance in a shipyard in Cadiz, Spain, where most of the crewmembers, all of whom were Greek, joined the ship.

The AGIOS NICOLAOS V was on its first voyage for Valsky. The voyage began in Cadiz, Spain. From there the ship sailed to Beaumont, Texas, to load grain at Continental Grain Elevator. After loading the grain, she proceeded to the Soviet Union to discharge her cargo.

The AGIOS NICOLAOS V was and is a ship registered in Greece, flying the Greek flag. The ship is owned by Valsky Maritime, Ltd. (hereafter Valsky). The ship is operated by Valmas Brothers Shipping, S.A. (hereafter Valmas) from Piraeus, Greece. All the stock of both the shipowner Valsky and the ship operator Valmas is owned by three brothers, Nicholas Valmas, Christothis Valmas and Dimitris Valmas, all of whom are citizens and residents of Greece. All of the officers of both Valsky and Valmas are the same three brothers. Christothis Valmas has never been in the United States. One of his brothers once visited the United States as a tourist, and another visited some relatives in the United States. Neither company has any officers, agents or employees in the United States. Their ships are not advertised in the United States. Under Greek law, 75% of the crew must be Greek. The company gives preference to hiring Greek seamen. All of the officers are Greek. All employees of all companies live in Greece. Both companies are managed from Greece. Neither Valsky nor Valmas owns any property in the United States. All directors of both companies are Greek citizens. No citizen of the United States is employed by either Valsky or Valmas. The AGIOS NICOLAOS V was on its maiden and only voyage to the United States at the time of the accident.

Prior to the trial the District Court had overruled Petitioners' motion to dismiss this action wholly between

Greek nationals, but did not rule on the choice of law issue until the trial on the merits. At trial the District Court held American law and not Greek law applicable and awarded damages under American law to the seaman's surviving beneficiaries.

Petitioners respectfully submit the Courts below erred in holding the American law to be applicable and in retaining jurisdiction of the action wholly between Greek nationals.

REASONS FOR GRANTING THE WRIT

1.

As stated succinctly by former Chief Judge Brown in dissenting for himself and six of his fellow Circuit Judges from the refusal of the Court below to rehear the case en banc:

> ". . . the panel's opinion is contrary to the law of this Circuit and of the Supreme Court."

A. CONFLICTS WITH THE DECISIONS OF THE COURT

In both holding American law applicable and retaining jurisdiction the decision below is in direct conflict with the decisions of the Court in:

Lauritzen v. Larsen, 345 U.S. 571 (1953)

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)

Hellenic Lines Limited v. Rhoditis, 398 U.S. 306 (1970)

This trilogy of cases delineates eight factors to be considered in determining whether American law is applicable to an injury/death of a foreign seaman on a foreign vessel. Only the place of the accident in the United States points to the application of American law in this case. This alone is not enough as *Romero* specifically held on this "narrow issue" that "the amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury."[1] 358 U.S. at 384. The panel below concedes that the place of injury in the United States alone is not enough. 628 F.2d at 317, footnote 17.

In *Lauritzen,* the first of the trilogy, the Court listed six factors other than the place of the injury which were to be considered, all of which require the application of Greek law to this case:

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1. The basic reason behind this rule was stated by the Court to be:

> "Discussing the significance of the place of the wrongful act, we pointed out in Lauritzen that '[t]he test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate . . . the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag.' 345 U.S. at 583, 584. Although the place of injury has often been deemed determinative of the choice of law in municipal conflict of laws, such a rule does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign nations. To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country." 358 U.S. at 383-384.

	This Case
1. Law of flag	Greece
2. Allegiance of injured .	Greece
3. Allegiance of shipowner	Greece
4. Place of the contract ..	Greece. Contract of employment made Union contract applicable which provided for injury/death claims to be governed by Greek law and to be adjudicated in Greek courts.
5. Foreign remedy available	Yes, in Greece[2]
6. Law of the forum	Is not to be imposed on foreign shipowners "just because local jurisdiction of the parties is obtainable." 348 U.S. at 591.

Once again, the panel below conceded these six other factors required the application of Greek law and dismissal.

The panel below then turned to *Rhoditis* in which the Court added the seventh factor to be considered—the shipowners base of operations. In *Rhoditis,* American law was held applicable in a suit for the death of a Greek seaman who was killed in New York against his Greek

2. In footnote 15, page 272, the panel apparently gives some credence to plaintiffs' claim that a Greek forum is not available to the plaintiffs. The plaintiffs' Greek law expert (also counsel for plaintiffs in this case) testified they could have received compensation under Greek law 551 or elect to proceed in tort in Greece (T/P pp. 78-80). Defendants' legal expert also testified that the plaintiffs had these remedies available in courts of Greece (Domvros Depo. p. 21).

shipowner employer because the Greek shipowning corporation had an "extensive business operation" in the United States, with its largest office in New York and another in New Orleans. The Greek citizen who owned more than 95% of the stock in the shipowning corporation was a U.S. domiciliary who had lived in the United States for 25 years and managed the shipowning corporation from New York.

That the Greek shipowners in this case had no such substantial base of operations in the United States is established by the uncontradicted evidence in this case.[3]

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3. This is easily demonstrated:

Rhoditis	*This Case*
1. Ninety-five percent of the stock in this Greek corporation which really owned the vessel belonged to two alien residents of the United States, a father and his son. The father had been a lawful permanent resident alien since 1952. Operation of the vessel was by Hellenic Lines, a Greek Corporation, with the same ownership.	1. All of the stock of Valsky, the shipowning corporation, and Valmas, the operating corporation, are owned by the three Valmas brothers, all Greek citizens and all lifelong residents of Greece. One brother has never been to the United States, one came on one occasion as a tourist and the third came on one occasion to visit relatives in 1950. (App. pp. 82, 83, 100).
2. Both the shipowning corporation and the operating corporation were managed by the father and the principal base of operations for both corporations was in New York City. The operating corporation also has an office in New Orleans.	2. The shipowning corporation has an office in Monrovia, Liberia but is managed and operated from Greece. The operating corporation is managed and has its principal base of operations in Greece and all orders to the vessel are sent from Piraeus. (App. p. 89). Neither has any officers, directors or even employees in the United States. (App. p. 92). Their ships are not advertised in the United States. (App. p. 90). On a ship to ship basis, the operating cor-

The completely unfounded conclusory assertions by the panel below that the vessel had "a substantial base of operations" in the United States were initially made by the Plaintiffs, blindly accepted by the Trial Court, and then by the panel below. No page reference citations to the record where the evidence on which these unfounded conclusory assertions are based has ever been given by the Plaintiffs, by the Trial Court or by the panel below. Indeed they have given none because none exists. In the dissent from the refusal of the Court below to rehear the case en banc, the importance of such omissions is succinctly stated:

> "It is significant that neither the District Court nor the panel made any finding to the effect that defendant corporations or any individuals having anything to do with their direction and control had their principal—or indeed, any—place of business in the United States. Nor was there any finding that the expenses of the vessel were paid in the United States,

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poration may hire a protecting agent in the United States to handle any problems the vessel may have while in port. (App. pp. 92, 93).

3. The vessel was engaged in regularly scheduled runs between various Gulf ports of the United States and ports in the Middle East and all of the vessel's income was from cargo either originating or terminating in the United States ports.

3. The vessels of the Valmas brothers do not have any regular scheduled runs to or from ports in the United States. (App. p. 88). They are what are called "tramp vessels"—ones who take their cargo from and to ports anywhere in the world as they are directed to do by those who charter the vessel. The vessel involved in this case was on its maiden and only voyage to the United States prior to the accident.

> or that the actual management of the vessel was from a United States office, or that any of the stockholders of the defendants were United States citizens or residents. Indeed, no finding was even made that defendants maintained any offices in the United States or were even affiliated with any organization that had offices or operations in the United States." 636 F.2d at 1109.

No such findings could be made because the undisputed evidence in the record establishes as a matter of law that no such operations or activities were carried on by these Defendants in the United States. One would have thought that at a minimum the Defendants were entitled to have the name of the alleged town, city, village or hamlet from which they were allegedly operating stated.

The holding of the panel below that the Defendants had a substantial base of operations in the United States is clearly and directly in conflict with the Court's holding on this issue in *Rhoditis* and it is respectfully submitted that the Petition for a Writ of Certiorari should be granted to resolve this conflict.

B. CONFLICTS WITH THE DECISIONS OF THE COURT BELOW

The decision of the panel below is also in direct conflict with at least three decisions of the Court below. As do all vessels when they call in American ports, the Defendant shipowners either had or utilized the services of a husbanding or protecting agent in the United States on a ship to ship basis to handle any problems while the vessel was in an American port with the agency terminating upon the departure of the vessel. Three decisions of other panels of the Court below have categorically held

that the employment of husbanding or protecting agents such as the one utilized by the Defendants on the vessel's only call to an American port does not constitute a "substantial base of operations" as contemplated by *Rhoditis*:

1. In *Merren v. A/S BORGESTED*, 519 F.2d 82 (5th Cir. 1975) the Court below held that a defendant who had no offices in the United States and was not affiliated with any organization in the United States except to hire a shipping agent who contracted in American ports for the use of the ship's services did not thereby establish a base of operations in the United States under *Rhoditis*.

2. In *Avila v. M/V TOLUCA*, 636 F.2d 1107, 1112 (5th Cir., May 30, 1980)[4] the Mexican shipowner did 30% of its shipping business in and out of United States ports and the vessel on which the seaman was killed in an American port had made "Ninety-seven visits to American ports for the period 1973 through August 15, 1975" (636 F.2d at 1113), which was the two and one-half year period immediately prior to the accident made the basis of the action. Held: The Mexican shipowner did not have a substantial base of operations in the United States under *Rhoditis*.[5]

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4. As the opinion had not been published at the time of the denial of rehearing en banc, the seven dissenting judges in the Court below published it as an appendix to their dissenting opinion.

5. When the panel decision in this case is applied together with the decision in *Avila*, apparently the rule of law in the Fifth Circuit would be something like this: A foreign shipowner on the maiden voyage of its foreign flag vessel using only a husbanding agent thereby establishes on this one call to an American port a substantial base of operations in the United States under *Rhoditis*, but if it continues to operate its vessels in and out of the United States using only such husbanding agents, at some time between the maiden voyage and the 97th voyage of its vessel to the United States, the foreign shipowner's activities in the United States no longer constitute a substantial base of operations within the meaning of *Rhoditis*.

3. In *Nunez-Lozano v. Oivind Lorentzen Rederi*, 634 F.2d 135 (5th Cir., December 5, 1980), the Court below reaffirmed the holding of *Merren* that the employment of shipping agents in the United States by a foreign shipowner is "insufficient to constitute 'base of operations'" (634 F.2d at 137) in the United States under *Rhoditis*.

4. In *Tamboris v. Kainis Compania Maritima, S.A.*, 439 F.2d 1131 (5th Cir. 1971) no *Rhoditis* base of operations was found because no American citizens or residents owned any part of the shipowning corporation directly or indirectly. While the number of calls made in American ports does not appear in the opinion, even if only one such call was made, the decision of the panel below conflicts because no American ownership exists in this case either.[6]

It is particularly significant that although *Merren*, *Tamboris* and *Avila* were all decided prior to the panel decision in this case, and all were cited to the panel (even *Avila* which was rendered after oral argument but four months before the rendition of the decision by the panel below), the panel did not cite any of these four cases nor attempt to distinguish them in any way. As none of them is distinguishable by even the wildest imagination, and as a panel alone cannot overrule prior decisions of other panels of the Court below as this can

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6. As the dissenting opinion on denial of rehearing so aptly states it:

"The substantially identical facts in *Merren*, *Tamboris* and most particularly *Avila* (to which must be added *Nunez-Lozano*), on the one hand and those in the instant case cannot justify the rejection of American law in those three (four) while allowing it here. To conclude otherwise is to permit decision of this very significant question of law to be determined, not by principles, but by an unguided fact finding." (Parenthetical expressions added). 636 F.2d at 1111.

be done only by the Court en banc under its own rules, to reach the result they desired, the panel had to completely ignore these three cases.

While one would normally expect a Court of Appeals to maintain consistency in its own decisions required by Rule 35(2) of the Federal Rules of Appellate Procedure, the supervisory powers of the Court clearly are such that it not only can, but should act to correct such a blatant disregard of their judicial obligations by those who declined to resolve this conflict upon rehearing en banc.[7]

2.

The decision of the panel below is also in direct conflict with the decisions of the Courts of Appeals for the Second, Third and Fourth Circuits on what activities of a foreign shipowner in the United States are sufficient to establish a substantial base of operations under *Rhoditis*. This can be quickly demonstrated:

Second Circuit: Koupetoris v. Konkar Intrepid Corp., 535 F.2d 1392 (2nd Cir. 1976). The foreign vessel called seven times at U.S. ports in 1974, the year of the injury to the foreign seamen. Even though the foreign shipowner's husbanding agent in New York drew on the shipowner's bank account in New York to pay the vessel's expenses,

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7. Indeed it would be appropriate under the All Writs Act, 28 U.S.C.A. § 1651, for a writ of mandamus to be issued to the Court of Appeals below directing them to hear and resolve this conflict by rehearing en banc, but such an extraordinary (and distasteful) remedy is not necessary since the Court can accomplish the same purpose by granting the Petition for a Writ of Certiorari and remanding it with directions if it does not conclude it should hear the case.

to forward funds to the vessel's master and even appointed husbanding agents for the vessel in other U. S. ports. Held: the shipowner's base of operations was Athens, Greece. 535 F.2d at 1396.[8]

Third Circuit: De Mateos v. Texaco, Inc., 562 F.2d 895 (3rd Cir. 1977). The foreign shipowner was a wholly owned subsidiary of an American Corporation and its vessels regularly called at ports in New Jersey, Pennsylvania and Delaware. Held: No base of operations in the United States because "the vessel's base of operations, if it was not Panama, was London where TOT performed the management services that in the *Rhoditis* case were performed by Mr. Callimanopoulos in New York." 562 F.2d at 902.

Chirinos de Alvarez v. Creole Petroleum Corp., 613 F.2d 1240 (3rd Cir. 1980). The foreign vessel was owned by a corporation incorporated under the laws of Delaware and maintained an export sales office in New York. The properties

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8. Illustrative of the types of and extent of the necessary contacts to meet the *Rhoditis* test is:

Antypas v. Cia. Maritima San Basilio, S.A., 541 F.2d 307 (2nd Cir. 1976). The foreign vessel was owned by a Panamanian corporation whose stock was owned by American citizens. The vessel was managed by a general agent in New York. The vessel was operated on regular liner service between the United States and Europe and the United States and the Far East. The vessel was under the direct control of the New York agent, and the vessel's earnings were collected in New York and expenses were paid from New York. The vessel advertised for business in the United States, listing agents in various United States ports and the general agent in New York. Held: These contacts established a substantial base of operations under *Rhoditis* sufficient to require application of American law. None of these contacts by the Greek shipowners are present in this case.

and corporate headquarters of the shipowner were in Venezuela and approximately one-third of the shipowner's oil production in Venezuela was exported to the United States. Held: These activities in the United States did not establish a substantial base of operations under *Rhoditis*. 613 F.2d at 1246.

Fourth Circuit: Morewitz v. Andros Compania Maritima, S.A., 614 F.2d 379 (4th Cir. 1980). The foreign vessel was owned by a Panamaian corporation which during the period from April through October, 1973, called at various American ports. Held: No substantial base of operations under *Rhoditis*.

Fitzgerald v. Liberian S/T CHRYSSI P. GOULANDRIS, 582 F.2d 312 (4th Cir. 1978). In the month of June, 1974, the vessel made two calls to the port of Boston, Massachusetts and one to Philadelphia, Pennsylvania. Held: "The vessel's major base of operations is not in the United States." 582 F.2d at 315.

While all of these cases do not indicate whether the vessels involved had a husbanding agent while in American ports, there can be no doubt that each of them required such an agent if for no other reason than to provide the services necessary for the vessels to clear for entry and departure from the United States with United States Customs Offices, Immigration Offices, and the United States Public Health Service, and to handle any other problems which might occur while the vessels were in American ports.

The foregoing cases which involved many more calls in American ports by the vessels of the shipowners involved than the single call of Greek shipowner's vessel in this case all held not to establish a substantial base of operations in the United States under *Rhoditis*. The decision of the panel below directly conflicts with each of these decisions from the Courts of Appeals for the Second, Third and Fourth Circuits and the Petition for a Writ of Certiorari should be granted to resolve this conflict.

3.

The Petition for a Writ of Certiorari should be granted because the decision of the panel below presents this very important question of public policy:

> Whether by judicial decree the public policy of the United States for compensating injury/death claimants is to be substituted for the public policy of the home country of both the foreign seaman and foreign shipowner simply because the injury/death fortuitously occurs within the United States.

The decision of the panel below judicially decrees for the first time that the fortuitous circumstance of an injury/death in the United States is all that is required to make the entire American system of compensating seamen injury/death claimants applicable to foreign seamen employed by foreign shipowners aboard foreign flag vessels.[9]

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9. As the dissent on refusal to rehear en banc reflects, former Chief Judge Brown's own survey of the Circuit Court cases did not reveal any

> ". . . case which has held that the mere fact that a vessel called regularly at a United States port is sufficient to satisfy the 'substantial base of operations test' of Rhoditis." 636 F.2d at 1110.

The panel below fell into such a grievous error in substantial part because of its failure to comprehend the rule to be applied in personal injury/death case involving foreign seamen on foreign vessels which was first enunciated by the Court in 1885 in *The Belgenland v. Jensen*, 114 U.S. 355. In *The Belgenland* the Court expressly recognized two different rules to be applied in determining whether American admiralty courts should retain jurisdiction of a suit between two foreign parties. As to ship collision cases, those involving the *commonis juris*, that is, the common law of nations (normally involving vessels from two different foreign countries flying two different foreign flags, neither of whom could claim his own country's laws should be applied), the Court established the rule that an American court should retain jurisdiction unless special circumstances existed to show that justice would be better subserved by declining it. 114 U.S. at 367.

But the Court also recognized that an entirely different rule should be applied with respect to those actions involving internal matters aboard a vessel such as claims made by members of a foreign vessel's crew against their foreign shipowner employer. As to these internal matters, the Court held jurisdiction should not be retained as American admiralty courts should "not interfere between the parties in such cases unless there is a special reason for doing so."[10] The attempts by the panel below to avoid

10. In more detail the Court said:
". . . the case of foreign seamen is undoubtedly a special one when they sue for wages under a contract which is generally strict in its character and framed according to the laws of the country to which the ship belongs; framed also with a view to secure, in accordance with those laws, the rights and interests of the shipowners as well as those of master and crew, as well as when the ship is abroad as when she is at home. Nor is this special character of the case entirely absent when foreign sea-

this clear holding of the Court by implying that *The Belgenland* rule with respect to the internal affairs of a foreign vessel and its foreign owner does not apply where a choice of law question exists simply will not do. This rule established in *The Belgenland* relating to the internal affairs of a vessel was reaffirmed and reiterated in the exact context in which it is presented in this case by the Court in *Lauritzen*. Labeling it as "settled American doctrine," the Court said:

> ". . . As this Court held in United States v. Flores, *supra* (289 U.S. at 158), and iterated in Cunard S.S. Co. v. Mellen, *supra* (262 U.S. at 123):
>
> > 'And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require . . .'" 345 U.S. at 582.

In *Lauritzen*, the seaman's employment contract expressly provided that Danish law and the contract with the Danish union were to control seamen's injury/death claims against the Danish shipowner. The same contractual situations exist in this case. The employment contract executed by the Greek seamen in Piraeus, Greece expressly made the Collective Agreement between the

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men sue the master of their ship for ill-treatment. On general principles of comity, admiralty courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so . . ." 114 U.S. at 364.

Union of Greek Shipowners and the Panhellenic Seamen's Federation applicable to the decedent's employment aboard the vessel. The union agreement introduced by the Plaintiffs in the Trial Court expressly provides in unequivocal terms that any claim arising out of the seamen's employment is to be determined exclusively by Greek law and Greek courts:

> "SOLUTION OF INDIVIDUAL DISPUTES
>
> 1. Individual contracts of employment, on which the present collective agreement applies, will be governed exclusively, as to any claim arising out of seamen's employment, including claims on account of illness or accident, by the provisions of the present collective agreement and Greek law, being judged exclusively by the competent Greek authorities and Greek law courts, resort to any foreign courts and to any foreign law being prohibited and expressly ruled out." (Collective Agreement, page 22 of English translation)

In further reaffirming the rule of *The Belgenland* with respect to such internal matters aboard foreign vessels, the Court said:

> ". . . Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply. We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high seas, from so settling upon the law of the flag-state as their governing code. This arrangement is so natural and compatible with the policy of the law that even in the absence of an

> express provision it would probably have been implied. The Belgenland, 114 U.S. 355, 367, 29 L.ed. 152, 156, 5 S.Ct. 860: The Hanna Nielson (DC NY) 273 F. 171 . . ." 345 U.S. at 588-589.

The far-reaching implications of the panel's decision to replace the public policy of Greece with the public policy of the United States insofar as seamen's injury/death claims against Greek shipowners by Greek citizens is concerned is a startling and unwarranted deviation from this settled American doctrine.

The concern of the dissenting judges below that such a change in the public policy of the United States would open the floodgates of litigation with no substantive principles to guide the lower courts is fully warranted, and particularly so in view of what the dissenting judges recognized as America's "renowned largess for humanity."

Any such substantial change in the public policy of the United States should be left to the Congress as the Court emphasized in *Lauritzen* when importuned to adopt the same public policy as the panel below as a means of benefitting foreign seamen:

> "We are not sure that the interest of this foreign seaman, who is able to prove negligence, is the interest of all seamen or that his interest is that of the United States. Nor do we stop to inquire which law does whom the greater or the lesser good. The argument is misaddressed. It would be within the proprieties if addressed to Congress." 345 U.S. at 593.

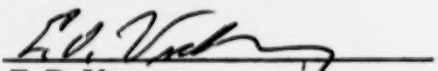
The Petition for a Writ of Certiorari should be granted to prevent the substantial change made by the panel below in the public policy of the United States with respect to

the compensation of foreign seamen's injury/death claims which occur within the boundaries of the United States.

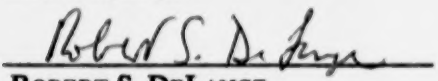
CONCLUSION

Petitioners respectfully submit that the Court should grant a writ of certiorari and reverse the decision of the panel below.[11]

Respectfully submitted,



E. D. VICKERY



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11. Once the determination of the choice of law issue is properly resolved and the Greek law held applicable, dismissal under *The Belgenland and Lauritzen* rule that jurisdiction should not be retained "unless there is a special reason for doing so" becomes clear. All of the eyewitnesses are Greek seamen, whose depositions had to be taken in Greece. The testimony of the three American witnesses (none of whom was aboard the vessel at the time of the accident) is available for use in Greece from the trial transcript. Such dismissal should be made without prejudice to the rights of the Plaintiffs to assert any claims they may have in Greece. Defendants expressly agree (1) to post the same financial security guaranteeing the payment of a judgment in this case in the U.S. in Greece, and (2) not to assert any defense based on a time limitation in the Greek law, provided such claims are asserted in Greece within six months (or such other time period the Court might select) after the Court's judgment becomes final.

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari and three copies of the Appendix have been served on all parties required to be served, i.e., on Respondents, by placing same in an envelope and depositing it in the United States mail, with first-class postage prepaid, addressed to counsel of record in accordance with Rule 28.3, as follows: Mr. Paul Dué, of Dué, Dodson & deGravelle, 442 Europe Street, Baton Rouge, Louisiana, 70802 and Mr. Frank A. Adams, of Adams & Adams, 1205 San Jacinto Building, Beaumont, Texas, 75951, on the 28th day of April, 1981.

E. D. VICKERY